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YES, BUT WHAT HAVE THEY DONE TO BLACK PEOPLE LATELY? THE ROLE OF HISTORICAL EVIDENCE IN THE VIRGINIA SCHOOL BOARD CASE

PEYTON MCCRARY*

INTRODUCTION

The protection of minority voting rights is currently facing its most serious challenge in the courts since 1966, the year the United States Supreme Court upheld the constitutionality of the Voting Rights Act.¹ The most critical attack lies in the area of congressional redistricting, where, in 1993, the United States Supreme Court, in *Shaw v. Reno*,² ruled that white plaintiffs challenging the bizarre shape of the black-majority Twelfth Congressional District in North Carolina had a right to a full trial on the merits of their claim. Although the North Carolina plaintiffs lost at trial,³ other courts have decided in favor of voters in Georgia, Louisiana, and Texas.⁴ These courts ruled that taking race into account in drawing district lines—even in order to meet the requirements of the Voting Rights Act—could constitute reverse discrimination against white voters. Under this approach, where racial purpose is the predominant motive in the adoption of a districting plan, the legislature's decision cannot be justified by the need to comply with the Voting Rights Act, and thus trig-

* Historian, Civil Rights Division, United States Department of Justice; B.A., M.A., 1965, 1966 University of Virginia; Ph.D., 1972 Princeton University. An earlier version of this paper was presented at the annual meeting of the Southern Historical Association, November 7, 1992. Its genesis lies in research performed as an expert witness for the plaintiffs in *Irby v. Fitz-hugh*, 693 F. Supp. 424 (E.D. Va. 1988), *aff'd sub nom.* *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990), while a professor of history at the University of South Alabama; an earlier draft was written while a visiting scholar at the Joint Center for Political and Economic Studies, Washington, D.C., thanks to financial support from the John D. and Catherine T. MacArthur Foundation. I wish to thank Larry Hartzell, Kathleen Andrews, and Dianne Thompson for research assistance and Neil Bradley, J. Gerald Hebert, Ricardo Romo, Bradley Rice, and David J. Garrow for editorial suggestions. The views expressed herein are those of the author and do not necessarily reflect the views of the Department of Justice.

1. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

2. 113 S. Ct. 2816 (1993).

3. *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994).

4. *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), *vacated and remanded*, 114 S. Ct. 2731 (1994), *on remand*, 862 F. Supp. 119 (W.D. La. 1994), *cert. granted*, 115 S. Ct. 687 (1994); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1984); *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *cert. granted*, 115 S. Ct. 713 (1995).

gers strict scrutiny under the equal protection clause of the Fourteenth Amendment.

The United States Supreme Court heard the Louisiana and Georgia cases in the spring of 1995. It reversed the lower court ruling in Louisiana on the grounds that the plaintiffs, who did not reside in the black-majority district under challenge, did not have standing to sue.⁵ In the Georgia case, however, the court affirmed the trial court decision and thus effectively transformed the Fourteenth Amendment, once a weapon for attacking minority vote dilution, into a bulwark of its defense.⁶

The erosion of Fourteenth Amendment protection in voting rights law began in the late 1980s with the lower court decisions in *Irby v. Virginia State Board of Elections*.⁷ In *Irby*, black plaintiffs challenged the constitutionality of Virginia's laws requiring the appointment, rather than the election, of all local school boards. Historical evidence of racially discriminatory intent between the 1870s and the 1970s played a pivotal role in their case. Both the trial judge and the appeals court conceded that during past decades the state had maintained the appointive system for invidious racial motives. But, because the plaintiffs did not prove that recent legislative decisions to maintain the status quo were also racially discriminatory in purpose, the courts dismissed the significance of the historical evidence.⁸ Additionally, both courts ruled that the appointive system no longer had a discriminatory effect on black representation.⁹ As a result the plain-

5. *United States v. Hays*, 63 U.S.L.W. 4679 (1995).

6. *Miller v. Johnson*, 63 U.S.L.W. 4726 (1995).

7. *Irby v. Fitz-hugh*, 693 F. Supp. 424 (E.D. Va. 1988), *aff'd sub nom. Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990). I served as an expert witness for the plaintiffs at trial, and historian Peter Stewart testified for the state. References to expert testimony are to the trial transcript.

8. As discussed in more detail below, the trial court, Judge Richard Williams, concluded that a 1971 revision of the state constitution, which the plaintiffs had not shown to be racially motivated, purged the appointive system of discriminatory intent (even though the alternative of elected school boards was not discussed in the revision process). *Irby v. Fitz-hugh*, 693 F. Supp. at 433. The Fourth Circuit Court of Appeals disagreed with this assessment but focused on the decision of a legislative committee that seriously considered switching to elective school boards in 1984, but rejected the idea. Because plaintiffs had not proved the 1984 decision was racially motivated, the appeals court ruled that the appointive process was no longer maintained for racial discriminatory purposes. *Irby v. Virginia State Bd. of Elections*, 889 F.2d at 1356.

9. The trial court relied on the fact that in the state as a whole, the percentage of school board members who were black approximated the percentage of the voting-age population that was black. *Irby v. Fitz-hugh*, 693 F. Supp. at 433-34. The appeals court focused on the results of the appointive system in the five local jurisdictions represented by individual plaintiffs in the lawsuit, and concluded that the racial disparities demonstrated by the plaintiffs were not statistically significant. *Irby v. Virginia State Bd. of Elections*, 889 F.2d at 1358-59.

tiffs, who had produced both circumstantial and direct evidence of racial purpose on the part of state officials, lost the case.

This Article will examine the historical evidence of discriminatory intent presented by the plaintiffs in the Virginia school board case and the basis on which the courts minimized the ultimate significance of this evidence. No courts have followed this precedent in deciding subsequent lawsuits. An analysis is needed, however, because the case raises disturbing questions about Fourteenth Amendment jurisprudence when its use in protecting minority voting rights is under assault from other quarters.

I. THE IMPORTANCE OF THE FOURTEENTH AMENDMENT IN MODERN VOTING RIGHTS LAW

A. *The Fifteenth Amendment*

Before 1965, protection of minority voting rights in the South was largely a function of the degree to which the federal courts enforced the constitutional guarantees of the Reconstruction Amendments.¹⁰ In 1965, Congress, believing that case-by-case litigation was insufficient to end systemic racial discrimination in the electoral process of the former Confederate states, relied on its authority to enforce the Fifteenth Amendment and adopted the Voting Rights Act.¹¹ The Supreme Court upheld the statute's novel intervention in electoral procedures, normally the preserve of state governments, on the grounds that "the constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience it reflects."¹² During the next quarter century, the Act, and related decisions by the federal courts on both statutory and constitutional grounds, have gone a long way toward assuring free access to the ballot box and fair representation in public office for minority voters previously denied those rights.¹³

10. See generally Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973).

11. 42 U.S.C. §§ 1971, 1973.

12. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

13. See generally QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994); Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1362-69, 1391-92 (1995) (summarizing central findings in *Quiet Revolution in the South*).

B. The Fourteenth Amendment as Applied, 1973 - 1982

By 1973, the Court, drawing on the one-person, one-vote principle it found in the Fourteenth Amendment (protection against *quantitative* vote dilution), decided in *White v. Register*¹⁴ that the constitution also prohibited *racial* vote dilution, that is, electoral procedures such as at-large elections or gerrymandered election district lines that result in diluting the effectiveness of the ballots cast by minority voters.¹⁵ In 1980, however, the Court restricted the reach of the Fourteenth Amendment by requiring plaintiffs in *City of Mobile v. Bolden*¹⁶ to prove that the at-large elections under challenge not only had a dilutive effect but were adopted or maintained with a racially discriminatory purpose.

Even under this new intent standard plaintiffs won on remand by presenting detailed historical evidence concerning the racial purposes of the decision-makers.¹⁷ Racially discriminatory intent need not be the sole, or even the primary, reason for the adoption of the election practice at issue. According to the standard set forth by the Supreme Court, plaintiffs seeking to prove a violation of the Fourteenth Amendment must show only "that a discriminatory purpose has been a motivating factor in the decision."¹⁸ In investigating whether officials have acted with discriminatory intent, furthermore, the courts are to focus on the context in which the decision is made, the views of decision-makers on related issues, the sequence of events leading to the decision, and the anticipated effect of the change on minority citizens, not just to direct expressions of purpose by decision-makers.¹⁹ This approach is consistent with the methodology normally employed by historians who have testified in a number of important cases concerning this issue.²⁰

14. 412 U.S. 755 (1973).

15. James U. Blacksher & Larry Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L. J. 1 (1982).

16. 446 U.S. 55 (1980).

17. *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982); *Brown v. Bd. of Sch. Comm'rs of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff'd*, 706 F.2d 1103 (11th Cir. 1983), *aff'd*, 464 U.S. 1005 (1983). See Peyton McCrary, *History in the Courts: The Significance of Bolden v. City of Mobile*, in *MINORITY VOTE DILUTION* 47, 47-65 (Chandler Davidson ed., 1984).

18. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265-66 (1977).

19. *Id.*

20. See Peyton McCrary & J. Gerald Hebert, *Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases*, 16 S.U. L. REV. 101 (1989).

In 1982, the Congress revised Section 2 of the Voting Rights Act to restore the standard of proof that focused on whether the electoral procedures at issue have the effect of diluting minority voting strength without requiring proof of intentional discrimination.²¹ Since that time, the courts have decided most voting rights litigation on a statutory basis, rather than under the Constitution.²² In two instances in the 1980s, however, the Supreme Court decided voting rights cases in favor of minority plaintiffs on the basis of the Fourteenth Amendment.²³ These two decisions set forth the standard of proof required at the time minority plaintiffs filed their challenge to Virginia's system of appointed school boards.

C. Rogers v. Lodge

The first case, *Rogers v. Lodge*, was decided only two days after the revised Voting Rights Act was signed into law in 1982, and was a challenge to at-large elections in Burke County, Georgia.²⁴ In this case, the Court found that the same legal standard described by the Congress in 1982 as a results test (the *White v. Register* "totality of circumstances" test used in the 1970s) could provide a sufficient basis for courts to conclude that an election system was being maintained—even if not originally adopted—for a racially discriminatory purpose.²⁵ As a practical matter, such evidence was probably the same as that required under the intent prong of the revised Section 2 of the Voting Rights Act.²⁶

21. 42 U.S.C. §§ 1971, 1973, 1988.

22. BERNARD GROFMAN ET. AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 42-81, 141-46 (1992). Even in cases decided under the Voting Rights Act, intent evidence has sometimes been the key factor in the courts' decision in favor of minority voters. See *County Council of Sumter County, South Carolina v. United States*, 555 F. Supp. 694 (D.D.C. 1983); *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986), *aff'd in part, vacated in part, remanded*, 831 F.2d 247 (11th Cir. 1987); *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991).

23. See *Rogers v. Lodge*, 458 U.S. 613 (1982); *Hunter v. Underwood*, 471 U.S. 222 (1985), *aff'g Underwood v. Hunter*, 730 F.2d 614 (11th Cir. 1984).

24. 458 U.S. 613 (1982).

25. For a comparison of the evidence in the Burke County case with the facts in *City of Mobile v. Bolden*, see Peyton McCrary, *Discriminatory Intent: The Continuing Relevance of 'Purpose' Evidence in Vote-Dilution Lawsuits*, 28 How. L.J. 463, 477-80 (1985).

26. J. Morgan Kousser, *How to Determine Intent: Lessons from L.A.*, 7 J.L. & POL. 591, 702-03 (1991). See also GROFMAN ET AL., *supra* note 22, at 40-41. I do not, however, agree with their observation that "the standard for determining the presence of unconstitutional vote dilution may therefore be a moot issue." See *id.* at 42.

D. Hunter v. Underwood

The Court's other Fourteenth Amendment decision, *Hunter v. Underwood*,²⁷ unanimously affirmed a lower court ruling striking down a disfranchising device — the "petty crimes" provision of the Alabama Constitution of 1901. The evidence of racial intent was unequivocal; indeed, the state conceded that a desire to disfranchise blacks was a substantial factor in adoption of the provision.²⁸ At that point, the Court observed that the burden shifts to the defendants: Once racial discrimination is shown to have been a "substantial" or "motivating" factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.²⁹

The state of Alabama sought to rebut the plaintiffs' purpose evidence by showing that: 1) the petty crimes clause was designed to disfranchise poor whites as well as blacks; and 2) the state "has a legitimate interest in denying the franchise to those convicted of crimes involving moral turpitude" (i.e., the crimes enumerated in the 1901 provision).³⁰ The Court summarily rejected the idea that a desire to disfranchise poor whites was a legitimate state interest that trumped the plaintiffs' Fourteenth Amendment claim.³¹ It also dismissed the state's moral turpitude claim, finding that "such a purpose simply was not a motivating factor of the 1901 convention" and that the "crimes involving moral turpitude" enumerated by the convention were "thought to be more commonly committed by blacks."³²

Once the Court determined that the petty crimes provision was adopted with a discriminatory purpose, it had to decide whether the device had a racially discriminatory impact. The immediate impact was stark: the provision "disfranchised approximately ten times as many blacks as whites" between its adoption in 1901 and January, 1903.³³ As to its current effect at the time of trial, the Court focused on the disparate impact in the two counties where the appellees (black persons disfranchised by the provision) resided: "This disparate effect

27. 471 U.S. 222 (1985), *affg* Underwood v. Hunter, 730 F.2d 614 (11th Cir. 1984).

28. *Hunter*, 471 U.S. at 230-31.

29. *Id.* at 228 (quoting *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

30. *Id.* at 232.

31. *Id.* "Whether or not intentional disfranchisement of poor whites would qualify as a 'permissible motive' within the meaning of *Palmer* and *Michael M.*, it is clear that where both impermissible racial motivation and racially discriminatory impact are demonstrated, *Arlington Heights* and *Mt. Healthy* supply the proper analysis." *Id.*

32. *Id.* (quoting a learned treatise read into the record by the state's own expert historian).

33. *Id.* (quoting the opinion of the Court of Appeals, *Underwood v. Hunter*, 730 F.2d 614, 620 (11th Cir. 1984)).

persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of non-prison offenses."³⁴

The degree of proof that a system adopted with a racial purpose continues to have a discriminatory impact is less substantial than that required to meet the effects test of Section 2 of the Voting Rights Act. Had the appellate court in the Virginia school board case applied this standard, arguably the plaintiffs would have been entitled to a judgment in their favor. The *Irby* court did not, however, refer at all to *Hunter*.

II. APPOINTIVE SCHOOL BOARDS BEFORE DISFRANCHISEMENT

A. Selection by the State Board of Education, 1870 - 1877

The historical evidence in *Irby* went back to the Reconstruction period. Virginia first established its statewide public school system in 1870 under the leadership of William Henry Ruffner, whom the first "redeemed" (post-Reconstruction) legislature chose as state superintendent of public instruction. The statute Ruffner drafted for Conservative legislators provided that a new state board of education would appoint all local school trustees in the state.³⁵ The purpose of empowering the state board, consisting of Superintendent Ruffner, the governor, and the attorney general, to appoint all school trustees and county superintendents was, quite simply, to provide a reliable mechanism for getting the job done.³⁶ Thus, the trial judge correctly noted that "there is no evidence, direct or circumstantial, that the original decision to make school boards appointive rather than elective was motivated by racial discrimination."³⁷ On the other hand, there is no reason to doubt that the Conservative legislature intended

34. *Id.* (once again quoting the opinion of the Court of Appeals, *Underwood v. Hunter*, 730 F.2d at 620.).

35. Act of July 7, 1870, ch. 259, 1870 Va. Acts 402. For a more thorough account of Ruffner's achievements, see JACK P. MADDEX, JR., *THE VIRGINIA CONSERVATIVES, 1867-1879: A STUDY IN RECONSTRUCTION POLITICS* 204-14 (1970); Walter J. Fraser, Jr., *William Henry Ruffner and the Establishment of Virginia's Public School System, 1870-1874*, *VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY* 259-79 (July 1971). Ruffner, whose father had served as president of Washington College in Lexington before the war, was endorsed for the job by that institution's current president in 1869, Robert E. Lee, and other leaders of the Conservative Party (i.e., the Democrats). *Id.*

36. Ruffner spent the summer of 1870 scouring the state for qualified personnel, resisting to the extent possible demands of Conservative politicians for appointment of their local supporters as trustees. Fraser, *supra* note 35, at 262-66.

37. *Irby v. Fitz-hugh*, 693 F. Supp. 424 (E.D. Va. 1988), *aff'd sub nom. Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990).

that only whites be appointed to school boards. "White supremacy," as historian Jack P. Maddex notes, was "an article of faith" for the Virginia Conservatives.³⁸

In 1871, the legislature began the shift to local selection of school boards, authorizing city councils to appoint municipal school trustees for each ward and incorporating existing municipal boards into the new state system.³⁹ White control of the schools was, under this selection method, dependent upon a Conservative majority on the city council. A look at the actions of several Virginia cities concerning this election method demonstrates the importance of party affiliation in the city council.

In Norfolk, which had established a public school system in 1857, the Conservatives successfully made white control of the schools a racial issue in the 1870 municipal elections.⁴⁰ In Richmond, public schools were established in 1869 while Republicans were still in power. Once Conservatives regained control of city government in 1870, however, they placed their own supporters on the school board at the first opportunity. White families preferred the city's flourishing private schools, and as a consequence black enrollment in the public schools was in the majority. The school board tried to use as many white teachers as possible in the black schools, but placed the more competent white instructors in the white schools. Even so, many Richmond whites complained that educating blacks was likely to spoil them for manual labor.⁴¹

Petersburg, where the Republicans had established public schools as early as 1868, was the only major city still under Republican control in the early 1870s. Consistent with the party's stated principles, the council appointed blacks to the school board and supported the schools generously. When Conservatives won a majority of the Petersburg City Council in the 1874 elections, one of their first actions

38. MADDEX, *supra* note 35, at 184. In their view, says Maddex, "the reins of government and society should remain in the hands of members of the white race." *Id.* at 191. Compared to their counterparts in the deep South, however, the Virginians were, he notes, "moderate white supremacists." *Id.*

39. According to *Kilpatrick v. Smith*, 77 Va. 347, 352 (1883), an 1871 session law made each city ward a separate school district with its own trustees, analogous to the sub-county district trustees in rural areas.

40. A Republican victory "means negro magistrates on your bench, negro policemen on your streets, negro legislators in your councils . . . negro commissioners in your schools," warned the *Norfolk Journal*, May 20, 1870, reprinted in THOMAS J. WERTENBAKER, *NORFOLK: HISTORIC SOUTHERN PORT* 245 (Marvin W. Schlegel ed., 2d. ed. 1962).

41. MICHAEL B. CHESSEON, *RICHMOND AFTER THE WAR, 1865-1890*, at 101, 166-67 (1981); HOWARD N. RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH, 1865-1890*, at 153, 173-74, 179 (1978).

was to appoint a new school board. In 1875, with state aid declining, the new Conservative school board initiated a policy requiring parents to have paid all their taxes before their children could attend school; enrollments immediately dropped 43 percent.⁴² Thus, party clearly made a difference in educational policy.

B. *Appointment by Local Commissions, 1877 - 1884*

Contrary to their handling of municipal school boards, the Conservatives did not turn the appointment of county school boards over to local officials until 1877, when they had reduced the Republican Party at the state level to a position of powerlessness.⁴³ Under this scheme, a local board consisting of the county's judge, its commonwealth's attorney, and its school superintendent chose all school trustees.⁴⁴ The party that controlled the state government would control at least two of the three members of the selection board: 1) the General Assembly, then as now, appointed all judges; and 2) the State Board of Education appointed county school superintendents. Consequently, only the local commonwealth's attorney had to go before the voters. Thus, even in counties where their opponents were strong enough to elect the local prosecutor, Conservatives would still control the selection of trustees. Elected school boards could have had quite a different effect, for even in 1877 some black-majority counties and city wards were likely to elect representatives of their choice.⁴⁵

Historians have long identified other provisions adopted by this "Redeemer" legislature as racially motivated. A series of Constitutional amendments subsequently ratified by the voters sought to limit black political participation or to minimize its effects. One amendment gave the General Assembly power to change the form of government for municipalities in order to deal with black-majority

42. WILLIAM D. HENDERSON, *GILDED AGE CITY: POLITICS, LIFE AND LABOR IN PETERSBURG, VIRGINIA, 1874-1889*, at 132-35 (1980); MADDEX, *supra* note 35, at 202.

43. The Republicans did not even nominate a gubernatorial candidate in 1877. CHARLES E. WYNES, *RACE RELATIONS IN VIRGINIA, 1870-1902*, at 14 (1961). Wynes notes that "one-party rule and white supremacy were near accomplished facts in Virginia." *Id.*

44. Act of Jan. 11, 1877, ch. 12, 1877 Va. Acts 9. WILLIAM A. LINK, *A HARD COUNTRY AND A LONELY PLACE: SCHOOLING, SOCIETY, AND REFORM IN RURAL VIRGINIA, 1870-1920*, at 20 (1986). It should be noted that William Link incorrectly dates the shift to local appointment of county school trustees at 1873.

45. MADDEX, *supra* note 35, at 200; Trial transcript I, at 18, *Irby v. Fitz-hugh*, 693 F. Supp. 424 (E.D. Va. 1988) (No. 88-2919) (McCrary testimony) [hereinafter Trial transcript I], *aff'd sub nom. Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990).

communities still under Republican control.⁴⁶ Another racially motivated amendment required proof of payment of the annual poll tax as a prerequisite for voting.⁴⁷ Still another amendment prohibited voting by anyone convicted of petit larceny; Conservatives saw this "petty crimes" provision as a way of minimizing black voting strength.⁴⁸ These amendments illustrate that the legislature acted with discriminatory purposes in adopting these election laws, thereby reinforcing the inference that the system of local electoral boards established in 1877 was designed by the Conservative majority to limit the chances of blacks serving on school boards. The trial court in *Irby*, however, found the evidence on this point "mixed."⁴⁹

Between 1879 and 1883, a new coalition that capitalized on the votes of small farmers and blacks took control of the state. Under the leadership of former Confederate General William Mahone, the Readjuster Party allied with the predominantly black Republicans in a coalition that produced some black electoral victories. For example, in the 1882 legislature, three of the coalition's senators and eleven of its delegates were blacks.⁵⁰ These black legislators won significant concessions from their Readjuster allies, abolishing the poll tax as a prerequisite for voting and eliminating the whipping post, which was used primarily as a punishment for black prisoners.⁵¹

46. WYNES, *supra* note 43, at 13. One year earlier, the legislature acceded to the demands of Petersburg Conservatives, who had just "redeemed" their black-majority city from Republican control, for a charter revision intended "to alter the structure of government in favor of the property owners." MADDEX, *supra* note 35, at 202.

47. Richard L. Morton, *The Negro in Virginia Politics, 1865-1902*, at 93 (1918) (unpublished Ph.D. dissertation, University of Virginia); WYNES, *supra* note 43, at 13-14; MADDEX, *supra* note 35, at 197-98; J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH* 171 (1974).

48. MORTON, *supra* note 47, at 92; C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913*, at 56 (1951); WYNES, *supra* note 43, at 12-13; MADDEX, *supra* note 35, at 198. A similar "petty-crimes" provision in Alabama was struck down by a unanimous Supreme Court decision (authored by then-Associate Justice William Rehnquist), in *Hunter v. Underwood*, 471 U.S. 222 (1985).

49. *Irby v. Fitz-hugh*, 693 F. Supp. 424, 427 (E.D. Va. 1988), *aff'd sub nom. Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990). The only evidence Judge Williams cited as a basis for this conclusion, however, was the racial outcome of appointment in the 1880s, after the Conservatives lost control of state politics: "In counties with Readjuster or Republican judges, commonwealth attorneys, or school superintendents, the local trustee electoral boards named board members sympathetic to black education, and in black majority counties they named blacks as school trustees." *Id.* These events took place in the early 1880s, and the Conservative legislature of 1877 could hardly have anticipated these developments. In describing the effects of the appointive system, the court relied entirely on my testimony, but confused the chronology of events. Trial transcript I, *supra* note 45, at 18, 22. The state's expert did not comment on the purposes of the 1877 law. *See id.* at 239-59 (Stewart testimony).

50. WYNES, *supra* note 43, at 22-23.

51. CHARLES C. PIERSON, *THE READJUSTER MOVEMENT IN VIRGINIA* 145 (1917).

The Readjusters greatly increased state financial support for the public schools, and appointed their own followers, including some blacks, as school trustees, county and city school superintendents, and judges.⁵² In Richmond and Portsmouth, the old school board members unsuccessfully challenged the legitimacy of the Readjuster appointees in the courts.⁵³ The struggle for control over school boards, however, was most dramatic in Petersburg. Black citizens in Petersburg were angry that the incumbent Conservative board would not hire black teachers, despite the fact that thirteen licensed black teachers were available. The State Board of Education devised a legal strategy enabling it to appoint a new school board in Petersburg, including three black members. The Readjuster school board then hired twelve black teachers and named two black principals, integrating the faculties of some schools and placing black principals over white teachers.⁵⁴ Although the black citizens were pleased with the result, others in the community voiced their displeasure. For example, the conservative *Richmond Times Dispatch* expressed outrage that blacks should be allowed to exercise control over white schoolchildren, teachers, and taxpayers: "Where and when did the [N]egro become possessed of the notion that he was the equal of the white man?"⁵⁵

C. Selection by the General Assembly, 1884 - 1887

In 1883, the Conservatives, now calling themselves Democrats, used such racial appeals to regain a majority in the legislature.⁵⁶ The Democrats took immediate steps to gain control over the appointment

52. *Id.* at 145-46, 149-50; Morton, *supra* note 47, at 108-09, 115, 119; WYNES, *supra* note 43, at 21-22. See also NELSON M. BLAKE, WILLIAM MAHONE OF VIRGINIA: SOLDIER AND POLITICAL INSURGENT 188-92 (1935); CHESON, *supra*, note 41 at 185; RABINOWITZ, *supra* note 41, at 178-79. In his testimony, the state's expert incorrectly testified that when the Readjusters gained control of the state legislature and the governorship: "They don't do anything about education at that time, not a thing." Trial transcript I, *supra* note 45, at 244 (Stewart testimony).

53. Kilpatrick v. Smith, 77 Va. 347 (1883); Childrey v. Rady, 77 Va. 518 (1883).

54. HENDERSON, *supra* note 42, at 134-39. The State Board was able to appoint a new school board because the old board members had not taken the required oath when beginning their terms.

55. RICHMOND TIMES DISPATCH, May 26, 1883, quoted in RABINOWITZ, *supra* note 41, at 178. As liberal social critic Lewis Harvie Blair of Richmond recalled in 1889: "Did not the appointment by Governor [William E.] Cameron of Virginia of a few Negro school trustees suffice to hurl from power at the first subsequent election the Republican party [actually, the Readjuster-Republican coalition] which then controlled every branch of the state government?" LEWIS H. BLAIR, A SOUTHERN PROPHECY: THE PROSPERITY OF THE SOUTH DEPENDENT UPON THE ELEVATION OF THE NEGRO 162-63 (C. Vann Woodward ed., 1964).

56. Morton, *supra* note 47, at 119. As future United States Senator John W. Daniel put it during the 1883 campaign, "I am a Democrat because I am a white man and a Virginian." *Id.*

of school boards by requiring the General Assembly to appoint three private citizens as a school trustee electoral commission for each locality.⁵⁷ "Why go to Richmond to have the new 'school commissioners' named?" asked a Readjuster editor from the Shenandoah Valley. "Do the representatives from all sections of the State know more of the fitness of these men in each county than the people at home?"⁵⁸ A black delegate from Dinwiddie County, A. W. Harris, led the opposition to the proposed changes, protesting that "we want the school laws to remain as they now are," and that the Democratic bill "takes the matter further from the people than ever before."⁵⁹

It is essential to note that under current conditions the 1877 law providing for local appointment of school boards would not have given the Democrats the control they sought. In cities such as Petersburg, where the council was still under Readjuster control, and in counties with Readjuster or Republican judges, commonwealth attorneys, or school superintendents, the local trustee electoral boards could still name board members sympathetic to black education, and in black-majority counties might even name blacks as school trustees.⁶⁰ As a result, there appears to be an ulterior motive to this alteration of the 1877 law. Indeed, it is reasonable to infer that legislative appointment of local school board selection commissions was designed, to a significant degree, to achieve a partisan and racial purpose.⁶¹

This inference is reinforced by the fact that the 1884 legislature, now controlled by a Democratic majority, adopted another law designed to solidify white control, the Anderson-McCormick election law.⁶² This law gave election judges great discretion in the counting of ballots, which led to extensive fraud by Democratic election officials

57. Act of Feb. 20, 1884, ch. 138, 1884 Va. Acts 177.

58. PEOPLE (Harrisonburg), reprinted in WHIG (Richmond), Feb. 21, 1884.

59. WHIG (Richmond), Jan. 12, 1884.

60. See PIERSON, *supra* note 51, at 167; Morton, *supra* note 47, at 123.

61. Trial transcript I, *supra* note 45, at 21-22 (McCrary testimony). According to Professor Stewart, however, the shift to legislative appointment of school board members resulted merely from "a power struggle between readjusters and democrats." *Id.* at 244-45. In his view, "the issue was not one of race connected to school board election on the part of members of the state legislature." *Id.* Perhaps here is an appropriate point to note that expert witnesses have no control over the accuracy of court reporters. In this instance, the transcript records Professor Stewart as testifying that Dr. McCrary, rather than (as he actually said) J. L. M. Curry, made racially discriminatory comments about the school board appointment issue in 1884. *Id.*

62. WYNES, *supra* note 43, at 39-40.

in the years ahead.⁶³ "The Anderson-McCormick bill was passed in the interest of the white people of Virginia," the *Richmond Times Dispatch* announced frankly.⁶⁴ "It is a white man's law. It operates to perpetuate the rule of the white man in Virginia."⁶⁵

D. Return to Appointment by Local Commissions, 1887 - 1903

Once the Democrats consolidated their power throughout the state, they returned the authority to appoint district school trustees to the local counties. An 1887 law re-established the appointment procedure originally put into place for racially discriminatory purposes ten years earlier: under this statute the county judge, commonwealth's attorney, and school superintendent served as a school trustee electoral board.⁶⁶ This sequence of events leaves little doubt that this law, like the 1877 statute it replicated, was racially motivated.⁶⁷ Yet, neither court in *Irby* took a position on whether the 1887 statute was designed to prevent the selection of black school board members. The local appointing board remained unaltered until 1903. According to a recent study of Virginia local schools, all the school board members selected under this system were white.⁶⁸ Moreover, by the turn of the century, predictably, per-pupil expenditures were twice as high for white as for black schools.⁶⁹

63. KOUSSER, *supra* note 47, at 172. Kousser quotes long-time Democratic machine leader Hal Flood, who recalled that the law allowed Democratic election judges, after the polls were closed,

to turn everyone out of the election room until they had an opportunity to make the number of ballots in the ballot box tally with the number of names on the poll book. In the black counties this enabled them to change the ballots to suit themselves. This was done in many instances to save those counties from Negro domination.

Id. Woodward quotes the recollection of another prominent Democrat: "They thereupon determined that they would never run the risk of falling under [N]egro domination again, and they accordingly amended the election laws so that the officers of election, if so inclined, could stuff the ballot boxes and cause them to make any returns that were desired." WOODWARD, *supra* note 48, at 105.

64. RICHMOND TIMES DISPATCH, *quoted in* WYNES, *supra* note 43, at 40.

65. *Id.* According to Andrew Buni, the bill's architect, Delegate William A. Anderson, was a "white supremacist" who subsequently played a key role in defending disfranchisement in his capacity as state attorney general from 1902 to 1910. ANDREW BUNI, *THE NEGRO IN VIRGINIA POLITICS, 1902-1965*, at 7 (1967).

66. Act of May 14, 1887, ch. 233, 1887 Va. Acts 305 (Ex. Sess.), follows the provisions set forth in Act of Jan. 11, 1877, ch. 12, 1877 Va. Acts 9.

67. Trial transcript I, *supra* note 45, at 23-24 (McCrary testimony). Neither court addressed the issue of racial purpose in connection with the 1887 statute. *Irby v. Fitz-hugh*, 693 F. Supp. 424 (E.D. Va. 1988), *aff'd sub nom. Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990).

68. LINK, *supra* note 44, at 39-40, 234.

69. LOUIS R. HARLAN, *SEPARATE AND UNEQUAL: PUBLIC SCHOOL CAMPAIGNS AND RACISM IN THE SOUTHERN SEABOARD STATES, 1901-1915*, at 140 (1958).

III. THE DEBATE OVER ELECTED SCHOOL BOARDS AT THE DISFRANCHISING CONVENTION, 1901 - 1902

Despite the evidence presented by the plaintiffs and reviewed in the preceding pages, neither court in *Irby* ruled on the merits of the plaintiffs' claim that Virginia adopted and maintained the system of school board appointments by local selection commissions for racially discriminatory purposes between 1877 and 1902. Any doubts were resolved, however, by the debates at the Virginia Constitutional Convention of 1901-1902. All historians agree that a major purpose of the literacy test and the poll tax requirement adopted by the 1902 convention was to disfranchise most of the state's black citizens.⁷⁰ At the same time, the convention considered, but, after much discussion, rejected the idea of requiring popular election of school trustees.⁷¹ During the debate over appointed school boards, delegates expressed their racial intent as openly as when discussing the poll tax or literacy requirements, but this debate has gone virtually unexamined.⁷²

While the disfranchising measures were still under debate, the committee on education recommended an amendment that would have replaced the local trustee selection boards with a system of popular elections: "[i]n each school district there shall be elected by the people three school trustees, whose term of office shall be four years."⁷³ According to a member of the committee from Northern Virginia, J. B. T. Thornton of Prince William County, he and his colleagues had assumed that this provision "would not be passed upon in Convention until the question of franchise had been settled."⁷⁴ After delegates on the floor convinced him that disfranchisement might not be immediately implemented, Thornton supported an amendment which left the choice in the hands of the legislature, stating that

70. KOUSSER, *supra* note 47, at 176-80; RALPH C. McDANIEL, THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901-1902, at 24 (1928); BUNI, *supra* note 65, at 16. On this point, at least, both experts in *Irby v. Fitz-hugh* agreed. Trial transcript I, *supra* note 45, at 24-29 (McCrory testimony), 246-48 (Stewart testimony). Indeed, who could doubt a goal so openly espoused. Carter Glass of Lynchburg, the anti-machine "reformer" who was a driving force behind disfranchisement, was merely its most colorful defender when he declared that the convention's purpose was "to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution with the view to the elimination of every [N]egro who can be gotten rid of, legally, without materially impairing the strength of the white electorate." 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA 3076 (1906) [hereinafter 2 REPORT].

71. 2 REPORT, *supra* note 70, at 1828-30.

72. The single exception is legal scholar A. E. Dick Howard. See 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 934 (1974).

73. 2 REPORT, *supra* note 70, at 1828.

74. *Id.*

"[t]here are a number of counties in the State in which we will have [N]egro trustees" if the new constitution were to require elected school boards. Thornton further declared: "That is a condition of affairs that is abhorrent."⁷⁵ D. Q. Eggleston of black-majority Charlotte County also urged the retention of the appointive system because "as the matter now stands, we would not only be liable, but likely, to have [N]egro school trustees in a good many districts in the State, if the trustees are to be elected by the people."⁷⁶ The only delegate to openly object was John C. Summers, a Republican delegate from Washington County in the mountains of southwest Virginia. Eventually, the convention eliminated the provision for popular election of school trustees by a vote of 58 to 25.⁷⁷ Faced with such overwhelming evidence, both Judge Williams and the appeals court ruled that the 1902 decision to maintain appointed school boards was motivated by the specific purpose of preventing blacks from serving on school boards.⁷⁸

IV. APPOINTIVE SCHOOL BOARDS AFTER DISFRANCHISEMENT, 1903 - 1946

A. *Implementation of the Convention's Racial Purpose in 1903*

In 1903, the General Assembly reenacted the appointive system for local school boards, pursuant to the requirements of the new constitution. For municipalities, the system remained as it had been—the city and town councils appointed school trustees.⁷⁹ The appointive procedures used for county school boards were altered, however, in one minor respect. Instead of serving on the trustee electoral board himself, the circuit judge would appoint a "resident qualified voter" to serve with the commonwealth's attorney and the school superintendent.⁸⁰ The plaintiffs' expert in *Irby* inferred that the General Assembly was merely implementing the same invidious racial purpose expressed by convention delegates in 1902.⁸¹ Judge Williams ruled,

75. *Id.* at 1829.

76. *Id.* at 1830.

77. *Id.*

78. *Irby v. Fitz-hugh*, 693 F. Supp. 424, 428, 432-33 (E.D. Va. 1988), *aff'd sub nom. Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1354, 1356 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990). Both experts also agreed. Trial transcript I, *supra* note 45, at 26-29 (McCrary testimony), 256 (Stewart testimony).

79. Act of Dec. 31, 1903, ch. 512, 1903 Va. Acts 825, Sec. 1528.

80. Act of Dec. 28, 1903, ch. 509, 1903 Va. Acts 798, Sec. 1450.

81. Trial transcript I, *supra* note 45, at 29-30 (McCrary testimony).

however, that such an inference required proof of discriminatory intent.⁸² In light of the disfranchisement of blacks by the 1902 Constitution, Judge Williams believed, even an elective system "would have completely excluded blacks from school board participation."⁸³

The judge's ruling assumes that legislators in 1903 were sure that disfranchisement was immune to reversal by the federal courts. At that point in time, however, two lawsuits challenging the constitutionality of the disfranchising mechanisms put in place by the 1902 convention were on appeal to the United States Supreme Court.⁸⁴ In both cases, the lead counsel was Virginia expatriate John S. Wise, an ardent Republican member of the Readjuster coalition who became a prominent New York lawyer after leaving the state in the 1880s. In 1904, the Supreme Court ruled in the state's favor, assuring that most blacks would be disfranchised for the foreseeable future, but the Virginia General Assembly, not having the advantage of hindsight possessed by the trial judge in 1988, could not have predicted that outcome with confidence in 1903.⁸⁵

Maintenance of the appointive system assured continued white domination; of course, as long as blacks were completely disfranchised, elected school boards would have provided the same assurance. White dominance, in turn, produced disparate funding for the education of black children.⁸⁶ Official state data for the year 1917-1918 illustrate the disparity for the five defendant jurisdictions in the Virginia school board case. In Nottoway County, the expenditure for white pupils averaged \$16.03, while the average for blacks was \$4.19. For Buckingham County, the expenditure for whites was \$13.22 but

82. *Irby v. Fitz-hugh*, 693 F. Supp. at 433. The court observed that "[t]he plaintiffs have not proven, however, that the 1903 General Assembly modification and retention of the appointive scheme was done for racially discriminatory reasons." *Id.* "Although the act was passed at a time when a white supremacy movement was sweeping the post-Reconstruction South," Judge Williams added, "there is nothing in the record to suggest that the decision to continue to appoint school trustees was tainted by this racial animus." *Id.*

83. The appeals court, which had the responsibility for identifying errors in the trial court's assessment of the burden of proof, never referred to the 1903 act. *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989).

84. *Jones v. Montague*, 194 U.S. 147 (1904); *Selden v. Montague*, 194 U.S. 154 (1904).

85. See *Jones v. Montague*, 194 U.S. 147 (1904). On these cases and the uncertainty regarding possible challenges to disfranchisement in Virginia, see BUNI, *supra* note 65, at 34-46; ALLEN W. MOGER, VIRGINIA: BOURBONISM TO BYRD, 1870-1925, at 201-02 (1968).

86. MOGER, *supra* note 85, at 257. Moger paints a bleak picture for the early 20th century, just as the state's "progressive" leaders expanded public funding for education, citing an annual per-pupil expenditure for white children of \$12.84 and for each black child of \$5.60. *Id.* In seven Southside or Tidewater counties where two-thirds of the public school enrollment was black, Moger reports that "expenditures in 1915 for salaries of white teachers were nine times those of Negro teachers." *Id.* One of these counties spent \$12.37 per pupil in the white schools for every dollar spent on black pupils. *Id.*

only \$3.56 for blacks. Prince Edward County spent \$21.64 for white students but only \$4.37 for black pupils. In Halifax County, the figures were \$12.45 for whites and \$3.12 for black. Finally, the City of Petersburg spent \$20.03 per white student but only \$6.53 per black student.⁸⁷ Such racial disparities declined only with the success of lawsuits brought by the NAACP Legal Defense Fund during the 1930s and 1940s against the state which sought to defend its dual school system against the charge that segregation was inherently discriminatory.⁸⁸

B. Local Selection Commissions as a Bulwark of Machine Rule

The racially restricted electorate achieved through the 1902 constitution was a key ingredient in the success of the political machine that dominated Virginia politics for more than six decades, first under the leadership of United States Senator Thomas S. Martin, and then under Governor and United States Senator Harry F. Byrd.⁸⁹ According to historian Louis R. Harlan, the appointed school board facilitated the machine's control over local affairs: "The county school trustee electoral board, which had the real power over school administration, was securely controlled by local officeholders chosen by county conventions."⁹⁰

C. Proposals for Elected School Boards, 1920 - 1930

In those days, no one argued that the appointive system was free of political influence or that it promoted the interests of the public schools more effectively than would be true of elected school boards. Even educational reformers urged the state on several occasions in the 1920s to eliminate the appointive system in favor of elected school boards. As one commission reported to the legislature in 1920, "it

87. 1 VIRGINIA EDUCATION COMMISSION, VIRGINIA PUBLIC SCHOOLS: A SURVEY OF A SOUTHERN STATE PUBLIC SCHOOL SYSTEM 393-96 (1920).

88. HARRY S. ASHMORE, THE NEGRO AND THE SCHOOLS 60-65, 147 (1954); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 134, 197-99, 215-16, 256 (1975).

89. KOUSSER, *supra* note 47, at 179-81; V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 20 (1949); J. HARVIE WILKINSON, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS, 1945-1966, at 5, 20, 37-38 (1968).

90. HARLAN, *supra* note 69, at 137. "The county superintendent was also chosen by the machine," according to Harlan. *Id.* "Nominated at the county Democratic convention, appointed by a state board of education composed of statehouse officials, and confirmed by the senate," the county superintendents were controlled by the Democratic machine "even in Republican counties." *Id.* See additionally KEY, *supra* note 89, at 21-22; WILKINSON, *supra* note 89, at 33-34.

would be hard to invent a more unsatisfactory plan of local control than the one in vogue in Virginia."⁹¹ Those advocating a shift to a system of popular elections did not, however, intend to provide the possibility of black representation on school boards. Blacks were excluded from the white primary operated by the state's Democratic Party, and few undertook the rigorous process of trying to register for the meaningless general elections of the period.⁹² Instead, these educational reformers were advocating school board elections for white voters only.

Despite these recommendations, the General Assembly refused to adopt a popular election system. It did, however, modify the appointive procedure. Under the terms of a 1926 law, none of the members of the trustee electoral boards were to be public officials. Instead, the circuit judge would appoint all three members.⁹³ But, because in Virginia the General Assembly appoints all circuit judges, selection of school board members remained firmly under the control of the Byrd machine. Under this "tortuous, winding process of selection," as political scientist Wylie Kilpatrick put it, "the electorate is stripped of every measure of control over a large group of county officials."⁹⁴

V. AN ELECTED SCHOOL BOARD IN THE AGE OF MASSIVE RESISTANCE

Only one county in the state was ever allowed to go to a system of popular elections. In 1947, the General Assembly enacted a statute authorizing a referendum in Arlington County, which already employed a unique county manager form of government with the county supervisors elected at large, rather than by districts.⁹⁵ A substantial

91. VIRGINIA EDUCATION COMMISSION, *supra* note 87, at 20. Three subsequent commissions in the 1920s also proposed elimination of the appointive system in favor of popularly elected school boards, but the legislature ignored their recommendations. See Irving S. Driscoll, Jr., *The Evolution of School Boards in Virginia - 1810-1972: A Study of State-Local Interaction 180-84* (1979) (unpublished D.Ed. dissertation, University of Virginia).

92. BUNT, *supra* note 65, at 61-62, 79-80, 117, 120. Despite the fact that blacks were not able to participate in Democratic primary elections in this period, the state's expert inexplicably attached significance to the fact that electing county school board members would have required the use of the same single-member districts under which county supervisors were elected, "which I would think would enhance the possibilities of blacks being elected." Trial transcript 1, *supra* note 45, at 249 (Stewart testimony).

93. Act of March 6, 1926, ch. 106, 1926 Va. Acts 104.

94. WYLIE KILPATRICK, *PROBLEMS IN CONTEMPORARY COUNTY GOVERNMENT: AN EXAMINATION OF THE PROCESS OF COUNTY ADMINISTRATION IN VIRGINIA* 369 (1930). Kilpatrick predicted hopefully that "direct election of the school board will cut away the most inexcusable tangle of indirection now obtaining." *Id.* at 384.

95. Act of Jan. 30, 1947, ch. 61, 1947 Va. Acts 113.

majority voted in favor of popular elections in the referendum, and the five-person school board was thereafter elected at large in non-partisan elections. In 1956, however, the General Assembly abolished Arlington's popularly elected school board and returned the county to the restrictions of the appointive process.⁹⁶

This decision, which was designed to punish Arlington for its failure to fight a federal court order to admit black students to its schools, was among the first legislative steps in the Byrd machine's program of "massive resistance" to court-ordered school desegregation in the aftermath of *Brown v. Board of Education*.⁹⁷ When the NAACP filed a lawsuit, the federal court ordered the Arlington County School Board to come up with a desegregation plan.⁹⁸ On January 14, 1956, expressing its willingness to obey the law of the land, the board voted unanimously to do so.⁹⁹ Legislators in Richmond referred to the board's decision as an act of defiance toward the state's massive resistance policy, and were determined to punish Arlington.¹⁰⁰ In a gross violation of the local courtesy rule, not one of the 36 co-sponsors of the bill to abolish Arlington's elected school board were from Arlington, or even from northern Virginia.¹⁰¹ This process was justifiable, contended the bill's sponsor, because the Arlington School Board had adopted "certain so-called educational procedures that are repulsive to the conceptions of a great many of the good people of the county."¹⁰²

96. Act of Mar. 31, 1956, ch. 591, 1956 Va. Acts 949. The bill was the handiwork of machine stalwart Frank Moncure. *A Denial of Local Option*, RICHMOND TIMES DISPATCH, Feb. 1, 1956, at 16; ROBBINS L. GATES, *THE MAKING OF MASSIVE RESISTANCE: VIRGINIA'S POLITICS OF PUBLIC SCHOOL DESEGREGATION, 1954-1956*, at 124-25 (1962).

97. 347 U.S. 483 (1954). During its deliberations over the bill eliminating Arlington's elected school board, the General Assembly adopted a resolution favoring "interposition" and "nullification" of the Supreme Court's desegregation decision. BUNI, *supra* note 65, at 184. See generally JAMES W. ELY, JR., *THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE* (1976).

98. *Irby v. Fitz-hugh*, 693 F. Supp. 424, 428 (E.D. Va. 1988), *aff'd sub nom. Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990).

99. *Arlington School Board Adopts Integration Plan*, WASH. POST, Jan. 15, 1956, at 1.

100. *Bill Would Stop Arlington Funds*, WASH. POST, Jan. 15, 1956, at 1.

101. *Bill Would Abolish Elected Board*, WASH. STAR, Jan. 30, 1956, at 1B. On the other hand, among the sponsors was a legislator who was to play a significant role in future battles over elected school boards, Delegate Sam Pope of Southampton County. *Id.*

102. *Id.* Shortly after the school board's decision, Delegate John Boatwright of Buckingham County, which was 43 percent black in 1950, introduced a bill that would deny school funds to any school system that cooperated with court-ordered desegregation; the bill would, he said, "tie up the Arlington crowd, which seems to favor integration." *Bill Would Stop Arlington Funds*, WASH. POST, Jan. 25, 1956, at 12. Other delegates specifically mentioned their distaste for the board's willingness to comply with the desegregation order as the basis for the legislation. *Arlington Board Hit By Bill in Assembly*, WASH. POST, Jan. 31, 1956, at 16.

Not surprisingly, the Arlington County legislative delegation announced its unanimous opposition to the bill, as did the school board. The Arlington County P.T.A. sent a letter to every member of the General Assembly opposing its interference in local affairs.¹⁰³ Additionally, several hundred citizens journeyed to the state capitol to demonstrate their support for an elected school board.¹⁰⁴ The *Richmond Times Dispatch*, which generally supported massive resistance, declared that the Arlington bill was "an unjustifiable interference with local self-government," and added that "[e]ven if this is legal, which is debatable, it is indefensible."¹⁰⁵ Ultimately, the segregationist forces offered a compromise, which the Arlington delegation felt it had to accept. Rather than return to a trustee selection committee, the delegation agreed to the appointment of school board members by the county supervisors, with the present elected school board serving out its full term of office.¹⁰⁶ The massive resistance forces were content with this option because, as a result of a racially charged campaign, an ardent segregationist majority had recently gained control of the county board of supervisors.¹⁰⁷

Although these events in Arlington County convincingly show the level of racially motivated activity taking place throughout Virginia, this evidence did not convince the court in *Irby*. While conceding that the elimination of Arlington's elected school board was racially motivated, Judge Williams ruled that the evidence could only be applied to that county alone because no other locality had an elected school board at the time.¹⁰⁸ Judge Williams ignored evidence demonstrating that the statute eliminating Arlington's elected school board also, however, contained a provision explicitly prohibiting the

103. *Arlington Board Hit By Bill in Assembly*, WASH. POST, Jan. 31, 1956, at 16; *Bill Would Abolish Elected Board*, WASH. STAR, Jan. 30, 1956, at 1B.

104. *Board Issue in Arlington Stirs Battle At Capital*, WASH. POST, Feb. 1, 1956, at 1; *Moncure Bill is Debated At Crowded Va. Hearing*, WASH. POST, Feb. 10, 1956, at 1.

105. *A Denial of Local Option*, RICHMOND TIMES DISPATCH, Feb. 1, 1956, at 16. For similar views, see *Squeeze on Arlington*, WASH. POST, Feb. 1, 1956, at 12.

106. GATES, *supra* note 96, at 125.

107. BENJAMIN MUSE, VIRGINIA'S MASSIVE RESISTANCE 24 (1961). The segregationist county supervisors, not surprisingly, voted to support the bill returning Arlington to the appointive system. *Arlington's Board Favors Moncure Bill*, RICHMOND TIMES DISPATCH, Feb. 7, 1956, at 1.

108. *Irby v. Fitz-hugh*, 693 F. Supp. 424, 433 (E.D. Va. 1988), *aff'd sub nom. Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990). The 1956 decision "created a cause of action unique to Arlington," the court ruled. *Id.* at 433. "No other county, including the named defendants, was affected by that decision, nor were the named plaintiffs affected by this intentional racially discriminatory act." *Id.*

use of elected boards in any other county of the state.¹⁰⁹ The historian testifying for the plaintiffs interpreted this explicit statewide prohibition as a reflection of “a more general intention to maintain white control,” but the judge dismissed the clause as a mere “redundancy.”¹¹⁰ The appeals court, however, agreed with the plaintiffs’ expert.¹¹¹

VI. THE 1968 DECISION TO MAINTAIN TRUSTEE SELECTION BOARDS

In the years following the passage of the Voting Rights Act of 1965, legislators from time to time introduced bills designed to allow popular election of school boards — yet each failed to pass. The most open debate occurred in 1968, when delegates from counties with small black populations introduced several bills authorizing voters, through a local referendum, to eliminate the appointive system in favor of popular elections. Opposition to these bills was concentrated, according to press accounts, in “rural counties with heavy concentrations of Negro citizens.”¹¹²

Delegate Donald Pendleton of mountainous Amherst County, a veteran “moderate” opponent of the Byrd machine, introduced a bill providing voters with a choice between popular election, appointment by the county governing body, or a continuation of the school trustee electoral boards.¹¹³ A subcommittee of the House Education Committee, however, revised the bill to eliminate the option of popular election. Julian Mason of Caroline, a heavily black rural county, said the subcommittee “couldn’t go along with direct election for fear the school boards would become too embroiled in politics.”¹¹⁴ Committee chairman Sam Pope, a veteran segregationist from Southhampton, an old plantation county, complained that “such an option ‘will wreck our situation’ in eastern Virginia counties,” because “there are

109. Act of Mar. 31, 1956, ch. 591, 1956 Va. Acts 549-550 (“Notwithstanding any other provision of law, general or special, no school board shall be elected by popular vote in and for any county or city”).

110. See Trial transcript I, *supra* note 45, at 33-35 (colloquy between McCrary and Judge Williams).

111. *Irby v. Virginia State Bd. of Elections*, 889 F.2d at 1356.

112. *School Board Selection Bill Killed By Senate*, RICHMOND TIMES DISPATCH, Mar. 9, 1968, at 2A.

113. H.R. No. 12, §§ 22-79.3 - 22-79.5, Jan. 11, 1968 (Virginia State Legislature); *Bills Affecting Education Move Ahead in Legislature*, DANVILLE REGISTER, Feb. 16, 1968, at 2.

114. *Id.*

thousands of voters in my county who can't read and write and yet they are qualified voters."¹¹⁵

The *Irby* plaintiffs were once again unsuccessful in conveying to the court the importance of these debates, which clearly displaying racial intent. The plaintiffs' expert interpreted Pope's comment as an expression of racial intent, in part because of Pope's conservative racial views on other issues. As a result, he concluded that the committee's decision to kill the proposal for elected school boards was racially motivated.¹¹⁶ The courts, however, ignored this view and the undisputed evidence of racial purpose the debates displayed.¹¹⁷

VII. THE PROCESS OF CONSTITUTIONAL REVISION, 1969 - 1971

In 1968, the state established a commission to propose changes in the Virginia constitution. The commission recommended numerous changes in the constitution designed to eliminate the vestiges of massive resistance in the education article, but it neither discussed the is-

115. *Id.* The specific content of Pope's remark implied a racial reference because the 1965 Voting Rights Act had enfranchised large numbers of blacks by outlawing literacy tests, on the grounds that Southern registrars operated such tests in a racially discriminatory manner. In Southhampton, an old plantation county, Pope's reference to illiterate voters would have been understood as referring to blacks. Trial transcript I, *supra* note 45, at 38-39 (McCrary testimony).

116. Pope was one of the sponsors of the racially motivated 1956 bill eliminating elected school boards for Arlington County. *Bill Would Abolish Elected Board*, WASH. STAR, Jan. 30, 1956, at 1B. During the 1959 debate over the use of tuition grants to promote segregated private schools facing federal court orders, Pope declared: "I'm hoping the availability of tuition grants will cause these people in Norfolk and other places to pull their children out of mixed schools," adding that "if anybody could come up with anything which would prevent integration, I would go along with it." *First Reaction of Lawmakers is Favorable*, RICHMOND TIMES DISPATCH, Jan. 29, 1959, at 1, 4. As late as 1969, when the House of Delegates was debating revision of the state constitution's article on education, Pope was still defending tuition grants, although he conceded that federal court orders had eliminated the possibility of using them to promote segregation. "I am not arguing the segregation issue, that is a dead issue so far as I am concerned. We have been sacrificed on the block in the southeastern part of Virginia [where the most heavily black counties were located]." *Proceedings and Debates of the Virginia House of Delegates Pertaining to Amendment of the Constitution* (Ex. Sess. 1969, Reg. Sess. 1970) (Mar. 28, 1969) 299 [hereinafter *Proceedings*]. Pope went on to lament that pupils were no longer allowed to sing tunes such as "Old Black Joe" or read "Little Black Sambo," which he characterized as "the story that did more than anything else to bring white and colored children to play together and to love each other." *Id.* The plaintiffs' expert read Pope's remarks into the record to illustrate Pope's racial views. Trial transcript I, *supra* note 45, at 56 (McCrary testimony). *Id.*

117. In voting rights cases, trial courts are required to make detailed findings of fact as well as conclusions of law. The state did not dispute my testimony on the 1968 decision. Trial transcript I, *supra* note 45, at 76-110 (McCrary cross-examination). Furthermore, the state's expert, Professor Stewart, did not testify concerning maintenance of appointed school boards after World War II. In fact, the trial court did not address the 1968 evidence at all. Nor, despite the plaintiffs' effort to flag the issue, did the appellate court. Brief of Appellants at 25-26, *Irby v. Fitzhugh*, 693 F. Supp. 424 (E.D. Va. 1988) (No. 88-2919) [hereinafter Brief of Appellants], *aff'd sub nom.* *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989).

sue of school board selection nor altered the appointive system.¹¹⁸ When the General Assembly sat as a constitutional convention in 1969, it eliminated many laws adopted during the 1950s that promoted segregation but had since been struck down by the federal courts. Yet, the legislature rejected any change in the 1902 provision leaving school board selection to the discretion of the legislature.¹¹⁹

The subject of appointed school boards came up in debate only once. Republican moderate Ted Dalton of Radford, who had courageously opposed the Byrd machine's "massive resistance" program in his unsuccessful 1957 gubernatorial campaign, introduced an amendment which would have eliminated the traditional trustee selection commissions and entrusted the appointment of school boards to county boards of supervisors, even if not to the voters.¹²⁰ Delegate Sam Pope spoke against Dalton's amendment, and once again the legislature refused to alter the status quo.¹²¹

As was true with the evidence of Arlington County, the trial court in *Irby* ignored this evidence of racial intent.¹²² In light of Pope's segregationist racial views, discussed above, the plaintiffs' expert inferred that the decision to kill Dalton's amendment was racially motivated.¹²³ But the state argued, and the trial court eventually ruled, that by leaving the issue of school board selection to the discretion of the General Assembly, albeit without discussion, the state

118. THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 2-3, 268, 485 (1969). The commission's executive director, Professor A. E. Dick Howard of the University of Virginia Law School, testified at trial that he set forth for the committee the numerous ways in which the constitution was infected with racially discriminatory provisions designed to promote segregation and disfranchisement, so that these provisions could be rooted out. Yet, he did not recall that he, or anyone else, mentioned the issue of appointed school boards. At trial, Howard did not recall whether at that time he was aware of the evidence concerning the 1902 debates. Trial transcript I, *supra* note 45, at 386-94 (Howard testimony). Subsequently, however, Howard published a treatise in which he found the decision to maintain appointive school boards in 1902 to have been racially motivated. 2 HOWARD, *supra* note 72, at 934.

119. On the revision process generally, see Hullihen W. Moore, *In Aid of Public Education: An Analysis of the Education Article of the Virginia Constitution of 1971*, 5 U. RICH. L. REV. 263 (1971).

120. *Proceedings*, *supra* note 116, at 299.

121. *Id.*

122. Judge Williams found "no evidence that the means of selecting school boards was tainted by racial considerations." *Irby v. Fitz-hugh*, 693 F. Supp. 424, 429 (E.D. Va. 1988), *aff'd sub nom. Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990). In his view, "[m]embers simply could not agree on which method was the best and put the debate off to another day by agreeing to preserve the flexibility that currently existed." *Id.* at 429.

123. Trial transcript I, *supra* note 45, at 55-56 (McCrary testimony).

purged itself of past discriminatory intent.¹²⁴ As also was true with the Arlington County evidence, however, the appeals court concurred with the plaintiffs' expert and disagreed with the trial court. "Although the 1971 constitution wrought dramatic (and racially progressive) changes in other areas pertaining to education," the court stated, "one cannot readily assume that such breaks with the past carried over to the school board selection provision which was retained without change and virtually without debate."¹²⁵

VIII. FURTHER UNDISPUTED PROOF OF RACIAL PURPOSE: THE CASE OF SURRY COUNTY, 1971 - 1973

The plaintiffs' expert cited the expansive of Surry County as another example of the extent to which, during the 1970s, the appointive system was consciously used to minimize black service on school boards. In Surry County, a black-majority county in southside Virginia, the trustee electoral board was used, according to historian James W. Ely, to perpetuate white control of the school system.¹²⁶ Surry, an old tobacco county, was among the poorest in the nation and suffered a declining population.¹²⁷ After the first seven black students were admitted to the one white school in the county in 1963, whites formed a private "segregation academy" to which all the white students and all the white teachers moved. The all-white school board then closed the former white school and reduced the appropriation of school funds.¹²⁸ Additionally, as late as 1971 whites held all the important positions in the county government and all but one of the seats on the school board that presided over an all-black public educational system.¹²⁹

In November, 1971, however, blacks won three of the five seats on the county board of supervisors, which are elected, as in virtually

124. *Irby v. Fitz-hugh*, 693 F. Supp. at 433. "The Constitutional Revision Commission addressed directly the policies of massive resistance and purged them from the educational system," the court observed. "Article VII of the Constitution affirms this commitment." *Id.* Yet even here, where the burden of proof rested squarely with the state, Judge Williams placed the burden on the plaintiffs, emphasizing that in the legislative debates "there is no evidence that the means of selecting school boards was tainted by racial considerations," and concluded that "the state has met its burden of proof in demonstrating that at least since 1971 the system has not been maintained for racially discriminatory reasons." *Id.* at 429, 433.

125. *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1356 (4th Cir. 1989).

126. ELY, *supra* note 97, at 199-201. For an additional account of the Surry experience, see NEAL R. PEIRCE, *THE BORDER SOUTH STATES: PEOPLE, POLITICS, AND POWER IN THE FIVE BORDER SOUTH STATES* 96 (1975).

127. ELY, *supra* note 97, at 199-201.

128. *Id.* *Pettaway v. County Sch. Bd. of Surry County*, 332 F.2d 457 (4th Cir. 1964).

129. ELY, *supra* note 97, at 199-200; PEIRCE, *supra* note 126, at 96.

all Virginia counties, by single-member districts.¹³⁰ Campaigning largely on a pledge to improve the school system blacks succeeded in making Surry the first Virginia county since Reconstruction with a black majority on the county board.¹³¹ The trustee selection board, however, stood squarely in the path of that campaign pledge.¹³² As a result, predicted the *Richmond Times Dispatch*, "for the time being, at least, the make-up of the school board will remain in the control of the county's white power structure — and the blacks will want that altered."¹³³ That prediction proved accurate on both counts.

The circuit judge named one black to the three-person trustee electoral commission; the commission then named two blacks to an expanded five-person school board, but turned down the nominations of the only black member of the electoral commission and appointed blacks that were favored by the white majority.¹³⁴ In response, the black community petitioned successfully for a referendum election on changing the form of appointment, taking advantage of a 1970 statute allowing voters to choose between the traditional trustee appointing commission and selection by the county board of supervisors. The local paper, the *Sussex-Surry Dispatch* commented that "[i]f the change is voted in, presumably the School Board eventually would have a Negro majority."¹³⁵

The paper's editorial comments just before the referendum offered the standard justification of the status quo: "under the present system of appointment, the School Board is far removed from political pressures."¹³⁶ The paper conceded that the alternative of appointment by the local governing body might seem, in principle, a good idea, but added that "a voter in Surry County has a right to consider whether (1) a more 'democratic' method is really needed and (2) such a change, which might otherwise be a good thing, is desirable at a particular time and under particular circumstances."¹³⁷ The circumstance that seemed to matter most to the paper's editor was that a

130. ELY, *supra* note 97, at 200.

131. *Id.*

132. ELY, *supra* note 97, at 200; Peirce, *supra* note 126, at 96.

133. *The New Mood*, RICHMOND TIMES DISPATCH, Nov. 14, 1971. "Surry is a one-issue county, and on that issue the school board will be the real seat of power." *Id.*

134. *Surry School Board Includes Two Negroes*, RICHMOND NEWS LEADER, Dec. 14, 1971, at 4; *2 Negroes, 3 Whites on Surry School Board*, SUSSEX-SURRY DISPATCH, Dec. 16, 1971, at 1.

135. *Surry to Vote May 2 on Trustee Selection*, SUSSEX-SURRY DISPATCH, Apr. 13, 1972, at 1. The statute allowing the referendum is Act of Mar. 19, 1970, ch. 126, 1970 Va. Acts 176.

136. *A Crucial Decision*, SUSSEX-SURRY DISPATCH, Apr. 27, 1972.

137. *Id.*

black majority controlled the county governing body: "Let's face it: On the surface, the situation has boiled down to a racial matter."¹³⁸

By a narrow margin the supporters of the existing appointment system prevailed in a referendum characterized by racially polarized voting. As a result, in 1973 the trustee electoral board was able to maintain white control by a three to two margin. Thus, white parents sent their children to private academies, for the most part, and the white-majority school board controlled the operation of the mostly black public schools.¹³⁹ Testifying to these events in court, the plaintiffs' expert in *Irby* cited the Surry experience, along with that of several other counties in the 1970s and 1980s, as evidence that Virginia's appointive system was retained for a racially discriminatory purpose and had the desired effect.¹⁴⁰ Neither court, however, noted this evidence of ongoing discriminatory intent in the operation of the appointive system at the local level. Consequently, like the other county specific evidence presented, the events of Surry County failed to persuade the court that there was a statewide intention to maintain white control on the school boards.

IX. THE 1984 DECISION TO MAINTAIN THE APPOINTIVE SYSTEM

As late as 1981, black representation on school boards was only 12 percent statewide although African Americans constituted 18 percent of the voting age population of Virginia.¹⁴¹ In 1984, the General Assembly established an ad hoc subcommittee to investigate the merits of authorizing elected school boards. The subcommittee held a series of hearings in various parts of the state. Generally, advocates of elected school boards argued that they are more democratic, more responsive to the wishes of the public, more effective in mobilizing interest in educational matters, and more independent of the county or city governing body.¹⁴² On the other side, proponents of retaining appointive school boards argued that "highly qualified citizens who prefer not to subject themselves to the demands of running for elected office are willing to serve on an appointed board as a community service."¹⁴³ Appointive boards, they continued, "are less likely to inject politics

138. *Id.*

139. ELY, *supra* note 97, at 201.

140. Trial transcript I, *supra* note 45, at 64-75.

141. *Irby v. Fitz-hugh*, 693 F. Supp. 424, 430 (E.D. Va. 1988), *aff'd sub nom. Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990).

142. *Report of the Subcommittee Studying School Board Selection*, Dec. 1984, at 2-3 (Virginia State Legislature).

143. *Id.*

and political ambitions into education since they are not seeking reelection or using the school board as a political stepping stone," and thus are "more likely to avoid the problem of single-issue campaigns."¹⁴⁴ In the end, the subcommittee recommended modifications, many of which were subsequently adopted, such as requiring public hearings before making appointments or requiring that appointments provide a certain breadth of geographical representation, but refused to support a change to popular election.¹⁴⁵

Both plaintiffs and defendants in *Irby* agreed that neither the earlier racial purposes nor the current racial effects of school board appointment were raised in these deliberations. According to the appeals court, this stipulation was dispositive: "the district court did not clearly err in finding such evidence sufficient to demonstrate a lack of discriminatory intent in the current maintenance of the appointive system."¹⁴⁶ As the plaintiffs interpreted the standard, on the other hand, the state had to show that the subcommittee had weighed the non-racial justifications for the appointive process against its racially discriminatory effects in the present.¹⁴⁷ Eventually, the panel rejected the plaintiffs' argument. But, it is important to note that the

144. *Id.*

145. *Id.* The arguments offered in defense of the status quo might be described as elitist, or even undemocratic, but not as racial in character. *Id.*

146. *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1356 (4th Cir. 1989).

147. Brief of Appellants, *supra* note 117, at 33-34. Plaintiffs cited evidence concerning the legislature's revisions in the constitutional provisions regarding tuition grants to illustrate how the state could have met this burden. In the days of massive resistance the legislature had revised the constitution to permit tuition grants to individual students who might use them to attend private schools; the stated purpose at the time was to facilitate resistance to court-ordered racial integration. See Moore, *supra* note 119, at 300; ELY, *supra* note 97, at 45-46, 75-76, 88-89, 124, 157-58. By the time the 1969 legislature debated the issue, federal court decisions had invalidated tuition grants when used to frustrate school desegregation. See *Griffin v. Bd. of Educ.*, 296 F. Supp. 1178 (E.D. Va. 1969). Also, earlier, tuition grants were disallowed as part of the elimination of public schools in one southside county. See *Griffin v. Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964). Before the Commission on Constitutional Revision concluded its work, the courts also struck down Louisiana's tuition grant program. See *Poindexter v. Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968). Ultimately, the legislature retained the old provision in the 1971 constitution without change. Legislators recognized, however, that tuition grants could only be used for nondiscriminatory purposes under current law, and they articulated a non-racial goal: assuring the constitutionality of state aid used to educate physically or mentally handicapped students in specialized private programs. Moore, *supra* note 119, at 299-302. Thus, in the view of the plaintiffs' expert, the state maintained its tuition grant provision *without* a racially discriminatory purpose. Trial transcript I, *supra* note 45, at 61-62 (McCrary testimony). In a colloquy with plaintiffs' counsel, Judge Williams, once again misconstruing the burden of proof, indicated that this testimony was not "probative" if the witness, in his words, "can't testify that it was retained for discriminatory purposes." *Id.* at 62-63. The state provided no such affirmative evidence in regard to its decision to retain appointed school boards in 1984, and thus could not, in the plaintiffs' view, meet its burden of proof. Brief of Appellants, *supra* note 117, at 33-34.

appeals court never discussed what the state's burden actually was under current Equal Protection jurisprudence.¹⁴⁸

X. HOW THE FOURTEENTH AMENDMENT SHOULD HAVE BEEN APPLIED

In *Irby*, both the trial court and appellate court misapplied the Fourteenth Amendment by keeping the burden to prove discriminatory intent on the plaintiffs. Instead, once plaintiffs prove, as they did here, that racial discrimination is a motivating factor behind enactment of a law,¹⁴⁹ the burden shifts to the defendants to prove by the preponderance of the evidence that they would have taken the action in the absence of the impermissible motive.¹⁵⁰ Moreover, the courts have consistently ruled that the significance of such a finding of discriminatory intent does not dissipate with the mere passage of time.¹⁵¹ Indeed, the only further requirement under *Hunter* is proof of a continuing discriminatory result:

Without deciding whether § 182 [the Alabama petty crimes provision of 1901] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect.¹⁵²

As a result, evidence of discriminatory maintenance is not clearly required under *Hunter v. Underwood*.¹⁵³ According to the appeals court, however, the plaintiffs in the Virginia school board case provided convincing evidence of discriminatory maintenance in connection with legislative decision in 1956, and the constitutional revision

148. The appeals court cites neither *Hunter* nor *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), yet observes: "We need not decide whether the Equal Protection Clause mandates the burden-shifting scheme proposed by the plaintiffs because, even assuming that the burden shifted to the defendants, they have proved that racial discrimination no longer motivates Virginia's decision to retain an appointive system for selecting school board members." *Irby v. Virginia State Bd. of Elections*, 889 F.2d at 1355.

149. Recall that the trial judge found that the 1902 constitutional convention decided to retain the appointed school board system for a racially discriminatory purpose. *Irby v. Fitz-hugh*, 693 F. Supp. at 432.

150. *Mt. Healthy*, 429 U.S. at 287; *Hunter*, 471 U.S. at 228.

151. See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 211 (1973). Justice Brennan remarked that "remoteness in time certainly does not make those actions any less intentional." *Id.* In *Underwood v. Hunter*, 730 F.2d 614 (11th Cir. 1984), *aff'd sub nom. Hunter v. Underwood*, 471 U.S. 222 (1985), the Eleventh Circuit Court of Appeals, affirmed unanimously by the United States Supreme Court, struck down the Alabama "petty crimes" provision enacted in 1901, declaring that the passage of eight decades could not "render immune a purposefully discriminatory scheme whose invidious effects still reverberate today." *Underwood*, 730 F.2d at 621.

152. *Hunter*, 471 U.S. at 233.

153. *Id.* at 228, 233.

process from 1969 to 1971.¹⁵⁴ To the extent that the purposes underlying the 1984 decision to maintain the appointive system are relevant, the logic of the Court's decision in *Hunter* places the burden of proof on the defendants.¹⁵⁵ In evaluating the purpose of an official action under the Equal Protection Clause, courts are required to pay particular attention when the sequence of events leading to that action includes a record of official discrimination on account of race.¹⁵⁶ The court's own extensive findings of intentional discrimination in the maintenance of Virginia's appointive system through 1971 must therefore weigh heavily in the balance. In addition, the trial court noted that as late as 1981 blacks were still significantly underrepresented.¹⁵⁷ In light of these circumstances, the fact that race was never discussed at the time of the 1984 legislative decision hardly meets the test set down by the Supreme Court.¹⁵⁸

XI. EVIDENCE OF CONTINUING EFFECTS

The appellate panel's assessment of the intent evidence from the 1984 hearings appears to be substantially based on its assessment of the quantitative evidence concerning the system's current effects at the time of trial. The parties agreed on the facts concerning the percentage of blacks serving on school boards throughout the state, but disputed how best to interpret them. Very few blacks served on school boards in 1970, but by 1981, 12 percent of school trustees statewide were black.¹⁵⁹ By 1987, the year the case was filed, blacks made up 18 percent of all school board members in the state; looking only at the statewide aggregate, therefore, blacks had proportional representation.¹⁶⁰ Judge Williams gave primary weight to this factor in concluding that the appointive system no longer had a disparate impact on blacks.¹⁶¹

154. *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1356 (4th Cir. 1989).

155. *Hunter*, 471 U.S. at 233.

156. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267 (1977). "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267.

157. *Irby v. Fitz-hugh*, 693 F. Supp. at 430. The trial court used statewide aggregate data as the test of discriminatory effect. Although African Americans made up 18 percent of the voting age population in Virginia was black, they represented only 12 percent of school board members. *Id.*

158. *Hunter*, 471 U.S. at 233.

159. *Irby v. Fitz-hugh*, 693 F. Supp. at 430.

160. *Id.*

161. *Id.* at 430, 433-34.

This statewide pattern, however, obscured as much as it revealed. In many school districts, blacks were under 10 percent of the population and unlikely to elect representatives even if fair single-member district election plans were in place.¹⁶² Furthermore, in the Washington suburbs of Northern Virginia, in Charlottesville and Albemarle County, and in some Tidewater jurisdictions, blacks were significantly overrepresented on school boards. In twenty-six counties and four cities, on the other hand, blacks were *underrepresented* by at least one seat.¹⁶³

"The proper comparison," contended the appeals court, "must focus not on the statewide averages but rather on the figures for the five local jurisdictions at issue."¹⁶⁴ All reflected substantial underrepresentation of blacks: Buckingham County, 42 percent black, had a school board that was only 14 percent black; in 40 percent black Halifax County, 22 percent of school trustees were black; in Nottoway County, 37 percent black, the school board was 20 percent black; Prince Edward County, 37 percent black, had a school board that was 25 percent black; finally, the city of Petersburg, was 61 percent black and blacks made up only 44 percent of its school trustees.¹⁶⁵ Yet, in the view of the appeals court, these disparities were not substantial enough to conclude that the appointive scheme continued to operate with a discriminatory effect.¹⁶⁶

The plaintiffs argued that, under existing case law, once they proved intent they were required only to prove that the appointive system continues to have some discriminatory effect.¹⁶⁷ In addition to the evidence cited by the appeals court, plaintiffs pointed to large numbers of counties in which blacks were significantly underrepresented on appointed school boards.¹⁶⁸ They also emphasized that the appointment process was still overwhelmingly controlled by

162. See *id.* at 430-31. Thus, any black appointments would represent greater than proportional representation.

163. *Id.* at 424, 430.

164. *Irby v. Virginia State Bd. of Elections*, 889 F.2d at 1358.

165. *Irby v. Fitz-hugh*, 693 F. Supp. at 430. According to the appeals court, however, "the defendants produced expert testimony discounting the statistical significance of the figures in the defendant jurisdictions." *Irby v. Virginia State Bd. of Elections*, 889 F.2d at 1358. Actually, the witness questioned the statistical significance of the underrepresentation in the state as a whole, not the seven individual jurisdictions. Trial transcript I, *supra* note 45, at 348, 350, 354 (Rebecca Klemm testimony).

166. *Irby v. Fitz-hugh*, 693 F. Supp. at 430.

167. In the Alabama petty crimes case, for example, the courts were content with evidence that in the two counties in which plaintiffs resided blacks were at least 1.7 times as likely as whites to suffer disfranchisement under the petty crimes provision. *Underwood*, 730 F.2d at 620.

168. Brief of Appellants, *supra* note 117, at 13-17.

white trustee selection commissioners, county supervisors, or city council members.¹⁶⁹ Under prevailing case law, such evidence of continuing effect should have been enough to meet this burden.

CONCLUSION

In sum, the historical evidence of discriminatory intent in the operation of Virginia's appointive school boards over the century following adoption of local selection boards in 1877 is overwhelming. The plaintiffs met their burden of proof under the prevailing intent standard, thus obligating the defendants to prove that a racial purpose no longer animates the operation of that appointive system. The state did not meet that burden, and the courts failed to hold its lawyers to the appropriate standard. In addition, the plaintiffs demonstrated that the appointive system continued to exercise a discriminatory effect in many individual school districts. Having met their burden in regard to both intent and current effects, the plaintiffs were entitled to prevail under the standard set forth in *Hunter v. Underwood*.¹⁷⁰

In 1992, however, the Virginia General Assembly adopted legislation authorizing jurisdictions to adopt elected school boards through a referendum process. By the end of that year thirty-three counties, seven cities, and two independent towns had held referenda; all voted for elected school boards.¹⁷¹ Consequently, although the justice system failed, the plaintiffs may take some comfort in watching this last vestige of the age of massive resistance wither slowly away.

169. Plaintiffs presented anecdotal evidence concerning the dynamics of school board selection in several jurisdictions. Sometimes the pattern seemed not far advanced from the Surry County model. In 55 percent black Southampton County only two of seven school board members in 1988 were black. The county supervisors, a majority of whom were white, selected a white housewife whose children attended an all-white private academy over a qualified black candidate who had the backing of the black community. Henrico County, a suburb of Richmond, is almost 20 percent black and had never had a black school trustee. In 1988, blacks nominated seven individual candidates to be considered for five school board seats, but the county supervisors once again named an all-white board. Neighboring Chesterfield County had one black county supervisor; his fellow supervisors rejected both his nominees, however, and the county school board remained all white. When combined with the county-by-county data, this anecdotal evidence demonstrated that in a significant number of cities and counties the appointive system continued to have a racially discriminatory result. On this basis the plaintiffs' expert testified that "in some jurisdictions of the State of Virginia there was a continuing discriminatory effect." Trial transcript I, *supra* note 45, at 70-71, 73, 75 (McCrary testimony); Brief of Appellants, *supra* note 117, at 13-17.

170. *Hunter*, 471 U.S. at 222.

171. Act of Apr. 1, 1992, ch. 594, 1992 Va. Acts; Memorandum to the author from Audrey Piatt, Virginia Board of Elections, Feb. 16, 1993.

